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No. 87-412

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

PATRICK VILARDO AND ROBERT OVERBECK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners assert (Pet. 8-10) that they have been deprived of a right to review of their contention that a pending indictment was tainted by an irregularity in the grand jury proceeding.[1]

1. On November 26, 1986, petitioners were indicted by a grand jury sitting in the Eastern District of Kentucky. They were charged with conspiracy to damage property by arson and to commit mail and wire fraud, in violation of 18 U.S.C. 371 (Count One); arson of property used in interstate commerce, in violation of 18 U.S.C. 844(i) (Count Two); and various counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts Three through Six), and wire fraud, in violation of 18 U.S.C. 1343 (Counts Seven through Nine).[2] The indictment followed a joint state and federal

[1] The order of the court of appeals denying leave to appeal (Pet. App. 1-2) was entered on June 12, 1987. The petition was filed on September 10, 1987, and is therefore out of time under Rule 20.1 of the Rules of this Court.

[2] Trial on these charges is pending and has been stayed until the Court acts on this petition.

investigation of the deliberate burning of a nightclub in Covington, Kentucky.

Co-defendant Harold Thornberry, who was charged in three counts, moved to dismiss the indictment on the ground that the Commonwealth Attorney for Kenton County, Kentucky, was improperly designated as a "Special Assistant United States Attorney" in the joint investigation and was not legally authorized to appear before the federal grand jury. Petitioners joined in the motion, which the district court denied.

Following the denial of the motion to dismiss, the district court certified the question for appeal to the court of appeals under 28 U.S.C. 1292(b), finding "that a controlling question of law is involved with respect to which there is substantial ground for difference of opinion, and that an immediate appeal from the Order may materially advance the ultimate termination of litigation" (Pet. App. 3-4). The district court also stated that in light of this Court's decision in *United States* v. *Mechanik*, 475 U.S. 66 (1986), denial of an immediate appeal would leave petitioners without the means to preserve the issue for appeal at a later stage in the case (Pet. App. 4).

Petitioners accordingly sought leave from the court of appeals to take an interlocutory appeal from the district court's order. The court of appeals denied the petition to appeal (Pet. App. 1-2). The court stated that "[i]t is well established in this circuit that 28 U.S.C. §1292(b) provides for interlocutory appeal in civil cases only" (Pet. App. 2). Because the claim in the instant case arose in a criminal case, the court refused to permit an appeal under Section 1292(b).

2. Petitioners contend that if they are not given the right to interlocutory review of their grand jury challenges, they effectively will lose the right to have their claims reviewed at all. That is so, they suggest, because *United States* v. *Mechanik, supra*, makes it clear that such

claims do not survive a subsequent conviction by the petit jury. Petitioners, however, chose as their statutory basis for review a provision that is strictly limited to civil cases. Thus, even assuming the validity of their claim that *Mechanik* requires that defendants be given the right to pretrial appeals when they raise grand jury claims, the decision below forecloses only such appeals based on 28 U.S.C. 1292(b); it does not foreclose appeals resting on other jurisdictional bases.

No court permits review under Section 1292(b) of an interlocutory order in a criminal case. By its terms, Section 1292(b) is limited to civil cases. The courts have therefore uniformly disallowed interlocutory criminal appeals under that provision. See *United States* v. *White*, 743 F.2d 488, 493 (7th Cir. 1984); *In re Grand Jury Empanelled Aug. 14, 1979*, 638 F.2d 1235, 1238 n.2 (3d Cir. 1981); *In re April 1977 Grand Jury Subpoenas*, 584 F.2d 1366 (6th Cir. 1978) (en banc), cert. denied, 440 U.S. 934 (1979); *United States* v. *Selby*, 476 F.2d 965, 967 (2d Cir. 1973); *United States* v. *Doucet*, 461 F.2d 1095, 1096 (5th Cir. 1972); see also 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure: Jurisdiction* § 3929, at 146 (1977).

To be sure, there is currently a division among the circuits on the question whether challenges to the indictment for grand jury irregularity are reviewable as final judgments, pursuant to 28 U.S.C. 1291, under the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Compare *United States* v. *The LaRouche Campaign*, No. 87-1731 (1st Cir. Sept. 17, 1987) (no interlocutory review of grand jury challenges), with *United States* v. *Benjamin*, 812 F.2d 548 (9th Cir. 1987), and *United States* v. *Dederich*, 825 F.2d 1317 (9th Cir. 1987) (granting right of interlocutory review under collateral order doctrine). See also *United States* v. *Taylor*, 798 F.2d 1337 (10th Cir. 1986) (no interlocutory

appeal because review of the challenges to the indictment at issue in that case held not to be foreclosed by *Mechanik*). That conflict is not presented in this case, however, because petitioners failed to invoke Section 1291 and the collateral order doctrine as a basis for appellate jurisdiction, and the court of appeals therefore had no occasion to address that issue. Because Section 1292(b) was the only jurisdictional basis that petitioners invoked below, and because there is no conflict among the circuits with respect to the holding that Section 1292(b) does not apply to criminal cases, review by this Court is clearly unwarranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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